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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/629,991	07/30/2003	Cheree L. B. Stevens	ADV12 P-305D	3726

277 7590 01/26/2006

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 01/26/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

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Office Action Summary	Application No. 10/629,991	Applicant(s) STEVENS ET AL.	
	Examiner Kelly Mahafkey	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-42 is/are pending in the application.
4a) Of the above claim(s) 24-34 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-23, 35-42 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>12/27/05, 6/20/05</u> | 6) <input type="checkbox"/> Other: ____ |

7/16/04, 3/25/04, 7/30/03

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
 - I. Claims 1-23 and 35-42, drawn to a frosted pastry composition, classified in class 426, subclass 94.
 - II. Claims 24-34, drawn to a method for making a coated toaster product, classified in class 426, subclass 302.

The inventions are distinct, each from the other because:

2. Inventions II and I are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case the product as claimed can be made by another and materially different process; the product as claimed does not require the step of thermal processing (i.e. the starch slurry will form a film at room temperature).
3. During a telephone conversation with Todd Van Thomme on January 5, 2006 a provisional election was made with traverse to prosecute the invention of Group I, claims 1-23 and 35-42. Affirmation of this election must be made by applicant in replying to this Office action. Claims 24-34 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 1 and 16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

6. Claim 1 recites the limitation "toaster pastry product" in line 4. There is insufficient antecedent basis for this limitation in the claim. Line 2 of claim 1 refers to a pastry product, not a toaster pastry product. In order to expedite prosecution, examiner will consider claim 1 line 4 as reciting a "pastry product".

7. Claim 16 recites the limitation "toaster pastry product of claim 1". There is insufficient antecedent basis for this limitation in the claim. Claim 1 recites a "pastry product" and not a "toaster pastry product". In order to expedite prosecution, examiner will consider the claim as reciting a "pastry product".

Claim Rejections - 35 USC § 102

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claim 1 is rejected under 35 U.S.C. 102(b) as being clearly anticipated by Earle et al. (US 45045032).

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10. Earle et al. (Earle) discloses of a composition comprising a pastry product at least partially coated with a film (i.e. a substantially clear coating composition) comprising a starch component wherein the composition provides at least a partial moisture barrier on the pastry product as recited in claim 1. Refer specifically to Abstract, Column 1 lines 14-23, Column 2 lines 31-36, Column 4 lines 45-55, and Column 5 lines 10-15.

Claim Rejections - 35 USC § 103

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

13. Claims 1, 3-7, 11, 14, 17, 18, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge (US 3723132) and in view of Baur et al. (WO 94/21143).

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14. Hodge teaches of a fried pastry product, which can be stored for extended periods of time, and which upon reheating will process texture and mouth feel of a freshly made product. Hodge teaches that the process of par frying, storing, and then heating after storage, prior to consumption via an oven or toaster, will increase the product's freshness of texture. Refer specifically to Column 1 lines 20-45 and Column 2 lines 11-31. Hodge is silent in teaching the clear coating composition as recited in claims 1, 7, 11, 14, 17, 18, and 22, the coating as a slurry with a specified amount of solids as recited in claims 3, 5, and 6, and the coating application temperature as recited in claim 4.

15. Baur et al. (Baur) discloses of products at least partially coated with a colorless transparent food glaze (i.e. a coating) as recited in claims 1 and 18, which can sustain heat processing (Abstract and Page 1, Background, and Example 1). Baur teaches that the glaze is for imparting a desirable crispiness and crunchiness (i.e. a fresh texture) on a raw, partially cooked or fully cooked products that are intended to be reheated or fully cooked for consumption (Background, Page 1 lines 35-37, and Page 2 lines 1-8). Baur teaches that food substrates are typically French fries, but that they include *any* food substrate, which can be coated and frozen, or coated, cooked, frozen or chilled, and subsequently reheated or fully cooked by frying, baking, or microwaving. Baur teaches that after the substrate is coated, it may be chilled, frozen or par- or fully- cooked. Refer specifically to Page 6 lines 7-21. Specifically regarding a partial moisture barrier as recited in claims 1 and 17, the coating composition as taught by Baur is taught for imparting a desirable crispiness and crunchiness (i.e. preventing a sogginess) on a raw,

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partially cooked or fully cooked products that are intended to be reheated or fully cooked for consumption (Background, Page 1 lines 35-37, and Page 2 lines 1-8).

Therefore, Baur teaches of the coating as maintaining *at least a partial* moisture barrier on the substrate. Specifically regarding claims 1, 7, 11, 14, 17, and 22, Baur discloses that the glaze contains about 5-50% wheat flour (wheat flour is composed partially of wheat starch- Page 2 lines 27-35), 5-50% modified corn starch (Page 4, Table I), about 2-20% dextrin (i.e. a film forming agent- Page 5 line, about 0.1-5% xanthan gum (i.e. a stabilizer- Page 5 lines 27-35), about 0.1-2.5% sodium bicarbonate (i.e. a leavening system- Page 8 lines 1-22), about 0.1-3.5% sodium acid pyrophosphate, (i.e. a leavening system- Page 8 lines 1-22), optional flavorings (i.e. including 0% sweetener as recited in claims 7 and 17- Page 9 lines 11-13), and water (Example 1). Specifically regarding claims 3, 5, and 6, in Example 1, Baur teaches of 41.6% of a dry mixture combined with 58.3% water to make the coating (i.e. the coating composition as a slurry at 41.6% solids). Specifically regarding claim 4, Baur teaches in Example 1, that the temperature at which the coating is applied to the pastry is 55F.

16. It would have been obvious to one skilled in the art at the time the invention was made to have had about 50% water mixed with a composition consisting of 5-50% wheat flour, 5-50% modified corn starch, about 2-20% dextrin, about 0.1-5% xanthan gum, about 0.1-2.5% sodium bicarbonate, about 0.1-3.5% sodium acid pyrophosphate, and optional flavorings to form a clear texture preserving coating to be applied to a pastry at about 55F as recited in claims 1, 3-7, 11, 14, 17, 18, and 22 in view of Baur on the texture preserved fried pastry product as disclosed by Hodge. One would have

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been motivated to do so in order to gain the benefits of the coating as disclosed by Baur, such a coating composition which imparts a desirable crispiness and crunchiness on a raw, partially cooked (par fried) or fully cooked products that are intended to be reheated or fully cooked for consumption (i.e. such as in an oven or a toaster).

Because both deal with products in which the primary objective is to maintain a desired texture, and in which the products are partially cooked, stored, and later cooked, one would have a reasonable expectation of success from the combination.

17. Claims 2, 8, 9, and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge and in view of Baur et al. (WO 94/21143) as applied to claims 1, 3-7, 11, 14, 17, 18, and 22 above and in view of LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>).

18. Modified Hodge teaches of a coating for a pastry product, which includes 5-50% modified cornstarch (Page 4, Table I), as discussed in above. Hodge, however, is silent to the coating as including modified wheat starch.

19. LrdRas states on September 4, 1998, "It is apparent that cornstarch and corn flour are the maize equivalents of wheat starch and wheat flour." As summarized by kat on September 5, 1998 LrdRas, "So the gist of what I have gleamed from this discussion is, amydown is a wheat-based starch with similar properties to modern cornstarch, is used in the same way and produces similar results."

20. It would have been obvious to one skilled in the art at the time the invention was made to substitute one known equivalent (i.e modified corn starch) for another (i.e.

modified wheat starch) as taught by LrdRas. One would have been motivated to choose whichever ingredient was available at the lower cost at the time of production.

21. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge in view of Baur et al. (WO 94/21143) and in view of LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>) as applied to claims 1-9, 11, 14, 17-19, and 22 above, and in view of Higgins et al. (US 5976607).

22. Hodge teaches of a coating for a pastry product as discussed in paragraphs 14-16 above. Modified Hodge is silent to the amount of slurry pick up on the edible substrate as recited in claim 16.

23. Higgins et al. (Higgins) discloses of a starch coating, which forms a moisture barrier, for fat fried foods (Abstract and Column 1 lines 60-67). Higgins teaches, "while the difficulties engendered with serving time differs somewhat from fried food to fried food, generally common to all the fried foods is that with prolonged serving time, i.e. the time between frying and serving, the fried foods lose their desired texture (Column 1 lines 14-28). In order to prevent this, Higgins teaches that a starch and dextrin containing coating should be applied to the substrate in the amount of 20-90% (Abstract).

24. It would have been obvious to one skilled in the art at the time the invention was made to include 20-90% pick up on the edible substrate in view of Higgins. One would have been motivated to include 20-90% pick up on the edible substrate in order to gain the benefits of the substrate, such as, a product with the desired texture, (i.e. a crispy

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and crunchy, non soggy product). Because both deal with the coating of fried products with a starch and dextrin composition, one would have a reasonable expectation of success from the combination.

25. Claims 7, 10, 15, 17, 20, and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge and in view of Baur et al. (WO 94/21143) and in view of LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>) and in view of Higgins et al. (US 5976607) as applied to claims 1-9, 11, 14, 16, 17-19, and 22 above, and in view of Gonzalez-Sanz (US 5439697).

26. Hodge teaches of a coating for a pastry product as discussed in paragraphs 14-16 above. Modified Hodge is silent to a specific amount (i.e. greater than 0%) of or type of sweetener as recited in claims 7, 15, 17, and 23, to a specific type of wheat starch (i.e. modified or substitute modified) as recited in claims 10 and 20.

27. Gonzalez-Sanz (Sanz) discloses of a conventional coating composition for pastries, which includes starch, hydrocolloids, sweeteners, emulsifiers, and water, and the conventional properties of each component (Abstract and Column 2 lines 61-65). Sanz teaches that chemically and physically modified starches build viscosity and bind moisture. Refer specifically to Column 1 lines 10-29, Column 4 lines 36-68, and Column 5, lines 1-13. Sanz discloses that one role of sweeteners is to provide taste or flavoring (Column 3 lines 19-21). Sanz discloses that sweeteners, including granulated or solid forms function primarily as bulking agents, providing flavoring, moistness, and

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viscosity. In addition, sweeteners function to control water activity and density of the coating composition. Refer specifically to Column 3 lines 28-38.

28. Regarding a specific amount of or type of sweetener as recited in claims 7, 15, 17, and 23, it would have been obvious to one skilled in the art at the time the invention was made to have modified the coating composition as disclosed by modified Hodge to include a sweetener in view of Sanz. One would have been motivated to do so in order to gain the benefits of a sweetener, such as a flavoring agent, which provides moistness and viscosity. Because both deal with coating compositions for pastry products, one would have a reasonable expectation of success from the combination. It would have been further obvious to one skilled in the art at the time the invention was made to include any amount or type of sweetener depending on the desired amount of flavoring, moistness, and viscosity desired as taught by Sanz.

29. Regarding a specific type of wheat starch (i.e. modified or substitute modified) as recited in claims 10 and 20, it would have been obvious to one skilled in the art at the time the invention was made to have modified the coating composition as disclosed by Hodge to include a chemically or physically modified starch in view of Sanz. One would have been motivated to do so in order to gain the benefits of hydrophilic starch, such to build viscosity and bind moisture. Because both deal with coating compositions for pastry products, one would have a reasonable expectation of success from the combination. It would have been further obvious to one skilled in the art to use any type of modified starch depending on the specific amount of viscosity and moisture in the final product.

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30. Claims 12, 13, and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge in view of Baur et al. (WO 94/21143) and in view of LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>) and in view of Higgins et al. (US 5976607), and in view of Gonzalez-Sanz (US 5439697) as applied to claims 1-11, 14-20, 22, and 23 above and in view of Lenchin et al. (US 4510166).

31. Hodge teaches of a coating for a pastry product as discussed in paragraphs 14-16 above. Modified Hodge is silent to a specific type of dextrin as recited in claims 12, 13, and 21.

32. Lenchin et al. (Lenchin) discloses of converted starches, which with water form a creamy and smooth consistency, and are suitable in coatings or icings (Abstract and Column 8 lines 27-35). Lenchin teaches that different types of dextrin at different solubility levels have gel strengths and gel textures (Column 3 lines 37-66 and Table II).

33. It would have been obvious to one skilled in the art at the time the invention was made to include any specific type and amount of dextrin at any solubility level in the invention as taught by modified Hodge and in view of Lenchin. One would have been motivated to choose any type of dextrin or solubility level depending on the desired gel strength and texture. Because both deal with coatings or icings and dextrin, one would have a reasonable expectation of success from the combination.

34. Claims 35, 37, 39, and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge and in view of Baur et al. (WO 94/21143) and in view of

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LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>) and in view of Gonzalez-Sanz (US 5439697).

35. Regarding the composition of claim 35, the same limitations are shared as with claims 1, 7, 8, 14, and 15 and are rejected for the same reasons as stated in above in paragraphs 14-16 and 26-28.

36. Regarding claim 37, Hodge teaches of a fried pastry as recited in paragraph 14 above, but is silent to a stabilizer in the coating composition. Baur teaches of about 0.1-5% xanthan gum (i.e. a stabilizer- Page 5 lines 27-35) in the coating composition as discussed in paragraph 15 above. It would have been obvious to one skilled in the art at the time the invention was made to have had about 2-20% dextrin in a clear texture preserving coating to be applied to a pastry in view of Baur on the texture preserved fried pastry product as disclosed by Hodge. One would have been motivated to do so in order to gain the benefits of the coating as disclosed by Baur, such a coating composition which imparts a desirable crispiness and crunchiness on a raw, partially cooked (par fried) or fully cooked products that are intended to be reheated or fully cooked for consumption (i.e. such as in an oven or a toaster). Because both deal with products in which the primary objective is to maintain a desired texture, and in which the products are partially cooked, stored, and later cooked, one would have a reasonable expectation of success from the combination.

37. Regarding claim 39, Hodge teaches of a fried pastry as recited in paragraph 14 above, but is silent to a specific oxidized modified wheat starch in the coating composition. Sanz discloses of a conventional coating composition for pastries, which

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includes starch, hydrocolloids, sweeteners, emulsifiers, and water, and the conventional properties of each component (Abstract and Column 2 lines 61-65). Sanz teaches that chemically and physically modified starches build viscosity and bind moisture. Refer specifically to Column 1 lines 10-29, Column 4 lines 36-68, and Column 5, lines 1-13. It would have been obvious to one skilled in the art at the time the invention was made to have modified the coating composition as disclosed by Hodge to include a chemically or physically modified starch in view of Sanz. One would have been motivated to do so in order to gain the benefits of hydrophilic starch, such to build viscosity and bind moisture. Because both deal with coating compositions for pastry products, one would have a reasonable expectation of success from the combination. It would have been further obvious to one skilled in the art to use any type of modified starch depending on the specific amount of viscosity and moisture in the final product.

38. Regarding claim 41 or the viscosity of the coating composition, Hodge teaches of a fried pastry as recited in paragraph 14 above, but is silent to a Stein viscosity value as recited in claim 41. Sanz discloses of a conventional coating composition for pastries, which includes starch, hydrocolloids, sweeteners, emulsifiers, and water, and the conventional properties of each component (Abstract and Column 2 lines 61-65). Sanz teaches that chemically and physically modified starches build viscosity and bind moisture. Refer specifically to Column 1 lines 10-29, Column 4 lines 36-68, and Column 5, lines 1-13. It would have been obvious to one skilled in the art at the time the invention was made to have chosen any particular viscosity by altering the amount of starch as disclosed by Sanz in the invention as taught by modified Hodge depending

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on the desired properties of the final product (i.e. water activity). Because both deal with coating compositions for pastry products, one would have a reasonable expectation of success from the combination.

39. Claims 36, 38, 40, and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge, and in view of Baur et al. (WO 94/21143) and in view of LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>) and in view of Gonzalez-Sanz (US 5439697) as applied to claims 35, 37, 39, and 41 above, and further in view of Lenchin et al. (US 4510166).

40. Regarding claim 36, the dextrin as comprising of corn dextrin, the same limitations are shared as with claims 1, 7, 11, and 12 and are rejected for the same reasons as stated in above in paragraphs 31-33.

41. Regarding the composition of claim 38, the same limitations are shared as with claims 35, 36, and 37, and are rejected for the same reasons as stated in above in paragraphs 35, 36, and 40.

42. Regarding claim 40 or the specific type of modified wheat starch, the same limitations are shared as with claim 39, and are rejected for the same reasons as stated above in paragraph 37.

43. Regarding claim 42 or the viscosity of the coating composition, the same limitations are shared as with claim 41, and are rejected for the same reasons as stated above in paragraph 38.

Double Patenting

44. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

45. A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

46. Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

47. Claims 1-23 and 35-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 5-9, 11, 14, 15, and 17-19 of copending Application No. 10/682,673 (673). Although the conflicting claims are not identical, they are not patentably distinct from each other because both contain a biscuit or pastry in which a similar coating composition is utilized as a partial

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moisture barrier. The only difference between 673 and the present invention is that the 673 is silent to the composition as clear, as applied to the pastry at a particular temperature, as maintaining a particular solids ratio, including granulated sugar or corn dextrin, as coating a specific amount of the pastry or biscuit, and as maintaining a particular viscosity as recited in claims 1, 4-6, 12, 13, 15-18, 36, 38, 41, and 42.

48. Regarding the composition as clear, it would have been obvious to one skilled in the art at the time the invention was made to have any clarity depending on the particular amount of each ingredient chosen in the given range, and if it was necessary for the pastry to be identifiable (i.e. the desired appearance).

49. Regarding the composition as applied to the pastry at a particular temperature and the viscosity of the composition, it would have been obvious to one skilled in the art at the time the invention was made to apply the coating at any temperature and at any viscosity depending on the desired method of application and the available equipment (i.e. pouring, spreading, ect).

50. Regarding the solids ratio in the coating composition, it would have been obvious to one skilled in the art at the time the invention was made to include any solids ratio depending on the desired texture of the final product (i.e. clumpiness vs. smoothness).

51. Regarding the use of granulated sugar coating composition, it would have been obvious to one skilled in the art at the time the invention was made to use any conventional sweetener known in the art (i.e. granulated sugar), in any amount depending on the desired intensity of flavoring.

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52. Regarding the use of corn dextrin in the coating composition, it would have been obvious to one skilled in the art at the time the invention was made to choose any conventional dextrin (i.e. corn dextrin) depending on the current dextrin costs and availability at the time of production.

53. Regarding a specific amount of coating on the pastry or biscuit, it would have been obvious to one skilled in the art at the time the invention was made to use any particular amount of coating on the pastry or biscuit depending on the desired flavor density on the biscuit or pastry (i.e. the amount of coating or flavoring with each bite of the biscuit or pastry).

54. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

55. Claims 1-23 and 35-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 2, 6-8, 12-17, 23-28, and 47-53 of copending Application No. 10682672 (672). Although the conflicting claims are not identical, they are not patentably distinct from each other because both contain a dough or batter, such as in the form of a pastry, in which a similar coating composition is utilized as a partial moisture barrier. The only difference between 672 and the present invention is that 672 is silent to the composition as clear, as applied to the pastry at a particular temperature, as maintaining a particular solids ratio, including granulated sugar or corn dextrin, as coating a specific amount of the

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pastry or dough, and as maintaining a particular viscosity as recited in claims 1, 4-6, 12, 13, 15-18, 36, 38, 41, and 42.

56. Regarding the composition as clear, it would have been obvious to one skilled in the art at the time the invention was made to have any clarity depending on the particular amount of each ingredient chosen in the given range, and if it was necessary for the pastry to be identifiable (i.e. the desired appearance).

57. Regarding the composition as applied to the pastry at a particular temperature and the viscosity of the composition, it would have been obvious to one skilled in the art at the time the invention was made to apply the coating at any temperature and at any viscosity depending on the desired method of application and the available equipment (i.e. pouring, spreading, ect).

58. Regarding the solids ratio in the coating composition, it would have been obvious to one skilled in the art at the time the invention was made to include any solids ratio depending on the desired texture of the final product (i.e. clumpiness vs. smoothness).

59. Regarding the use of granulated sugar coating composition, it would have been obvious to one skilled in the art at the time the invention was made to use any conventional sweetener known in the art (i.e. granulated sugar), in any amount depending on the desired intensity of flavoring:

60. Regarding the use of corn dextrin in the coating composition, it would have been obvious to one skilled in the art at the time the invention was made to choose any conventional dextrin (i.e. corn dextrin) depending on the current dextrin costs and availability at the time of production.

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61. Regarding a specific amount of coating on the pastry or biscuit, it would have been obvious to one skilled in the art at the time the invention was made to use any particular amount of coating on the pastry or biscuit depending on the desired flavor density on the biscuit or pastry (i.e. the amount of coating or flavoring with each bite of the biscuit or pastry).

62. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

63. As presently amended for co-pending Application No. 10170964, claims 1-23 and 25-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 40, 43, 46, 49, and 50 of copending Application No. 10170964 (964) and in view of Baur et al. (WO 94/21143). Although the conflicting claims are not identical, they are not patentably distinct from each other because both contain a biscuit or pastry in which a similar coating composition is utilized as a partial moisture barrier. The only difference between 673 and the present invention claims 1-23 is that the 673 is silent in claiming the clear coating composition as recited in claims 1, 7, 11, 14, 17, 18, and 22, the coating application temperature as recited in claim 4, the coating as containing modified wheat starch as recited in claims 2, 8, 9, 10, 19, and 20, the coating as having a pick up of 5-30% as recited in claim 16, a specific amount of or type of sweetener as recited in claims 7, 15, 17, and 23, and a specific type of dextrin as recited in claims 12, 13, and 21. The only difference between 673 and the present invention claims 35-42 is that the 673 is silent in claiming clear coating composition including a specific amount and type of sweetener and a specific

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type of dextrin, and xanthan gum as the a stabilizer as recited in claim 35-38, modified wheat starch as recited in claims 39 and 40, as maintaining a particular viscosity as recited in claims 41 and 42.

64. Baur et al. (Baur) discloses of products at least partially coated with a colorless transparent food glaze (i.e. a coating) as recited in claims 1 and 18, which can sustain heat processing (Abstract and Page 1, Background, and Example 1). Baur teaches that the glaze is for imparting a desirable crispiness and crunchiness (i.e. a fresh texture) on a raw, partially cooked or fully cooked products that are intended to be reheated or fully cooked for consumption (Background, Page 1 lines 35-37, and Page 2 lines 1-8). Baur teaches that food substrates are typically French fries, but that they include *any* food substrate, which can be coated and frozen, or coated, cooked, frozen or chilled, and subsequently reheated or fully cooked by frying, baking, or microwaving. Baur teaches that after the substrate is coated, it may be chilled, frozen or par- or fully- cooked.

Refer specifically to Page 6 lines 7-21. Specifically regarding a partial moisture barrier as recited in claims 1 and 17, the coating composition as taught by Baur is taught for imparting a desirable crispiness and crunchiness (i.e. preventing a sogginess) on a raw, partially cooked or fully cooked products that are intended to be reheated or fully cooked for consumption (Background, Page 1 lines 35-37, and Page 2 lines 1-8).

Therefore, Baur teaches of the coating as maintaining *at least a partial* moisture barrier on the substrate. Specifically regarding claims 1, 7, 11, 14, 17, and 22, Baur discloses that the glaze contains about 5-50% wheat flour (wheat flour is composed partially of

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wheat starch- Page 2 lines 27-35), 5-50% modified corn starch (Page 4, Table I), about 2-20% dextrin (i.e. a film forming agent- Page 5 line, about 0.1-5% xanthan gum (i.e. a stabilizer- Page 5 lines 27-35), about 0.1-2.5% sodium bicarbonate (i.e. a leavening system- Page 8 lines 1-22), about 0.1-3.5% sodium acid pyrophosphate, (i.e. a leavening system- Page 8 lines 1-22), optional flavorings (i.e. including 0% sweetener as recited in claims 7 and 17- Page 9 lines 11-13), and water (Example 1). Specifically regarding claims 3, 5, and 6, in Example 1, Baur teaches of 41.6% of a dry mixture combined with 58.3% water to make the coating (i.e. the coating composition as a slurry at 41.6% solids). Specifically regarding claim 4, Baur teaches in Example 1, that the temperature at which the coating is applied to the pastry is 55F.

65. Regarding claims 1, 3-7, 11, 14, 17, 18, and 22, it would have been obvious to one skilled in the art at the time the invention was made to have had about 50% water mixed with a composition consisting of 5-50% wheat flour, 5-50% modified corn starch, about 2-20% dextrin, about 0.1-5% xanthan gum, about 0.1-2.5% sodium bicarbonate, about 0.1-3.5% sodium acid pyrophosphate, and optional flavorings to form a clear texture preserving coating to be applied to a pastry at about 55F as recited in claims 1, 3-7, 11, 14, 17, 18, and 22 in view of Baur on the pastry product as claimed by 964. One would have been motivated to do so in order to gain the benefits of the coating as disclosed by Baur, such a coating composition which imparts a desirable crispiness and crunchiness on a raw, partially cooked (par fried) or fully cooked products that are intended to be reheated or fully cooked for consumption (i.e. such as in an oven or a

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toaster). Because both deal with coating pastry products, one would have a reasonable expectation of success from the combination.

66. Specifically regarding claims 2, 8-10, 19, and 20, 694 claims utilizing modified potato starch. It would have been obvious to one skilled in the art at the time the invention was made to substitute one known equivalent (modified potato starch) for another (modified wheat starch) depending on the current starch costs and availability at the time of production.

67. Regarding a specific amount of coating or pick up on the pastry or biscuit as recited in claim 16, it would have been obvious to one skilled in the art at the time the invention was made to use any particular amount of coating on the pastry or biscuit depending on the desired flavor density on the biscuit or pastry (i.e. the amount of coating or flavoring with each bite of the biscuit or pastry).

68. Regarding a specific amount of or type of sweetener as recited in claims 7 (above 0% sweetener), 15, 17, and 23, it would have been obvious to one skilled in the art at the time the invention was made to use any conventional sweetener known in the art (i.e. granulated sugar), in any amount depending on the desired intensity of flavoring.

69. Regarding the use of corn dextrin in the coating composition as recited in claims 12, 13, and 21, it would have been obvious to one skilled in the art at the time the invention was made to choose any conventional dextrin (i.e. corn dextrin) depending on the current dextrin costs and availability at the time of production.

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70. Regarding the composition of claim 35, the same limitations are shared as with claims 1, 7, 8, 14, and 15 and are rejected for the same reasons as stated in above in paragraphs 65, 66, and 68.

71. Regarding claim 36, the dextrin as comprising of corn dextrin, the same limitations are shared as with claims 1, 7, 11, and 12 and are rejected for the same reasons as stated in above in paragraphs 65 and 69.

72. Regarding claim 37, it would have been obvious to one skilled in the art at the time the invention was made to have had about 2-20% dextrin in a clear texture preserving coating to be applied to a pastry in view of Baur on the texture preserved pastry product as claimed by 694. One would have been motivated to do so in order to gain the benefits of the coating as disclosed by Baur, such a coating composition which imparts a desirable crispiness and crunchiness on a raw, partially cooked (par fried) or fully cooked products that are intended to be reheated or fully cooked for consumption (i.e. such as in an oven or a toaster). Because both deal with coating pastry products, one would have a reasonable expectation of success from the combination.

73. Regarding the composition of claim 38, the same limitations are shared as with claims 35-37, and are rejected for the same reasons as stated in above in paragraphs 70-72.

74. Regarding claims 39 and 40 recite the limitations concern an oxidized wheat starch and is rejected for the reasons as claims in paragraph 66 above.

75. Regarding claims 41 and 42 or the viscosity of the composition, it would have been obvious to one skilled in the art at the time the invention was made to apply the

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coating at any viscosity depending on the desired method of application and the available equipment (i.e. pouring, spreading, ect).

76. This is a provisional obviousness-type double patenting rejection.

Conclusion

77. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure:

78. US 6080434 discloses of a first and second starch coating with dextrin for fried potato products.

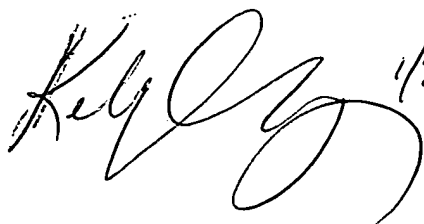
79. US 6022569 discloses of a process for preparing starch coated foods.

80. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

81. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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82. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

 1/23/06

Kelly Mahafkey
Examiner
Art Unit 1761



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